New York Newspaper Printing Pressmen's Union No. 2 *and* New York Times Company. Case 2–CB–20454–E

May 9, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On October 1, 2007, Chief Administrative Law Judge Robert A. Giannasi issued the attached Order granting the General Counsel's motion to dismiss the application for fees under the Equal Access to Justice Act (EAJA). The Applicant, New York Newspaper Printing Pressmen's Union No. 2, filed exceptions with a brief in support and the General Counsel filed an answering brief.

The National Labor Relations Board[1] has considered the judge's Order and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's findings[3] and conclusions[4] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of the Applicant, New York Newspaper Printing Pressmen's Union No. 2, New York, New York, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

Dated, Washington, D.C. May 9, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ORDER GRANTING MOTION TO DISMISS APPLICATION FOR FEES

1. Background

On July 6, 2007, the Board referred to me the Respondent's application for reimbursement of fees under the Equal Access to Justice Act (EAJA) and the General Counsel's motion to dismiss that application. On July 23, 2007, I ordered the Respondent to show cause why its application should not be denied and gave both parties the opportunity to file further statements of position. The parties subsequently filed further submissions. Based on those submissions and the entire record in this case, including the exhibits attached to the submissions of the parties, I grant the General Counsel's motion to dismiss the Respondent's application for fees.

Unlike in most EAJA matters, the underlying case here never came to trial and neither an administrative law judge nor the Board issued a decision. The case began with a charge filed by the Employer (The New York Times Company) on June 13, 2005, alleging that the Respondent, which represents a unit of the Employer's printing employees, violated the Act by attempting to cause the Employer to discriminate against employees based on union status. The Employer's charge was spawned by a June 10, 2005 letter from Respondent's then counsel to the contract arbitrator advising him of a dispute between Respondent and the Employer, under the applicable collective-bargaining agreement, regarding the Employer's "intention to hire individuals to serve as working foremen that are not members of Local 2 or any other GCIU affiliate." The letter also claimed that "with over 600 candidates within Local 2, and approximately 100,000 potential candidates within all of the GCIU affiliates nationwide, there is no legitimate basis for the New York Times to hire non-union employees as foremen." It also accused the Employer of engaging in an "ongoing campaign of anti-union tactics."

After the charge was filed, Respondent's counsel wrote another letter to the arbitrator, dated August 10, 2005, requesting an expedited arbitration and clarifying Respondent's position as follows: "[T]he Union's grievance concerning this matter requests that you resolve whether under the collective bargaining agreement and based upon more than 50 years of established practice, the New York Times has agreed to limit the foreman's position to individuals that are members of the bargaining unit, and whether the Company, having agreed to limit foremen's

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] We deny as lacking in merit the General Counsel's request to dismiss the Applicant's exceptions on the ground that they are "procedurally deficient."

[3] In adopting the judge's recommended Order, we do not rely on his discussion of *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

[4] We agree with the judge that the Applicant is not a "prevailing party" either under *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), or under Board precedent prior to *Buckhannon* (see, e.g., *Carthage Heating Co.*, 273 NLRB 120 (1984)), and it is on this basis that we adopt the judge's recommended Order and dismiss the EAJA application.

In dismissing the application, Chairman Schaumber also relies on the judge's finding that the Applicant did not meet its burden of establishing that it was financially eligible for an EAJA award. In reaching this conclusion, Chairman Schaumber agrees with the judge that the Applicant did not present sufficient evidence to establish that it is not controlled by its parent and affiliates and that therefore aggregation of assets would not be appropriate.

Member Liebman does not rely on this finding.

positions to unit members, has waived any right to hire from the outside."

Notwithstanding counsel's clarification as set forth in the August 10 letter to the arbitrator, the General Counsel alleges that Respondent's president, John Heffernan, continued to insist that the Employer hire only union members for the foreman positions. This allegation is supported by exhibits attached to the motion to dismiss, which are not contested by Respondent. The exhibits show that Heffernan testified at an arbitration hearing in late August of 2005, to the effect that the Union did not object to nonunit promotions as long as those promoted were members of Respondent. The exhibits also show that, in September of 2005, Heffernan advised members in a newsletter that the "Times does not have the right to hire non union foremen and try to force the union into accepting them into the local." The General Counsel also notes that the only provision in the collective-bargaining agreement that addresses the hiring of foremen is Section 5, which provides that the Employer is "privileged to select any member of the Union in good standing as foreman and assistant foreman."

The investigation of the charge resulted in the issuance of a formal complaint on June 30, 2006, which alleged that the Respondent, violated the Act by demanding, through President Heffernan, that the Employer hire only individuals who are members of the Respondent for the position of assistant foreman, and also by requesting expedited arbitration under the applicable collective-bargaining agreement in support of that demand. The complaint further alleged that such conduct interfered with employee rights under the Act and caused or attempted to cause the Employer to discriminate against its employees by conditioning eligibility for promotion upon membership in Respondent, in violation of Section 8(a)(3) of the Act, all in violation of Section 8(b)(1)(A) and (2) of the Act. The answer to the complaint denied the substantive allegations in the complaint, stating, as an affirmative defense, that the Respondent was simply seeking to have the Employer hire assistant foremen from the bargaining unit and not hire only union members for those positions. The answer also alleged that the matter should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement and that the allegations were inconsistent with the Supreme Court's decision in *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002). In response to a further provision in the answer alleging that the complaint allegation regarding the supervisory status of the assistant foremen was not relevant to the issues raised in the charge and the complaint, and after unsuccessful attempts at settlement, the Regional Director issued an amended complaint on August 17, 2006, essentially dropping the supervisory allegation of the original complaint.

On October 23, 2006, 2 days before the scheduled hearing on the amended complaint, the General Counsel filed a motion with Associate Chief Judge Joel Biblowitz to postpone the hearing because a related pending arbitration hearing was scheduled for November 29, 2006, which would provide the Union the opportunity to present its interpretation of section 5 of the collective-bargaining agreement, the focus of at least part of the amended complaint. According to the motion, a stay of the unfair labor practice case was appropriate so that the General Counsel could evaluate whether the Union's grievance is without reasonable basis or for an unlawful object, citing *BE & K,* supra, and *Bill Johnson's Restaurant,* 461 U.S. 731 (1983). Noting no opposition to the motion by the Employer or the Respondent, Judge Biblowitz granted the motion on October 24, 2006.

On January 17, 2007, counsel for Respondent filed a motion to dismiss the amended complaint on the ground that "[t]he continued prosecution of this case is not consistent with *BE & K* which requires the dismissal of the charge if the lawsuit is reasonably based." The Regional Director denied the motion on February 2, 2007, stating that the pending unfair labor practice allegations were broader than the subject matter being arbitrated by the parties. She also stated that the pending arbitration award might impact the issue of whether section 5 of the contract was unlawful.

On February 10, 2007, the arbitrator issued an award denying the Respondent's grievance in the arbitration referred to above. He described the parties' positions as follows: The Respondent's position was that section 5 required the Employer to select foremen and assistant foremen only from the bargaining unit. The Employer's position was that the applicable language in section 5 required the Employer to select only from Respondent's membership and that would violate the National Labor Relations Act. Noting that the Respondent conceded that if the contract were interpreted to allow the Employer to hire only a union member would render it unlawful under the Act, the arbitrator gave effect to the maxim that "a contract interpretation is preferred that would make an agreement valid over one that makes it unlawful." Applying that maxim and analyzing the language of section 5, the entire agreement, and its history, the arbitrator found that, in order to render section 5 of the agreement valid, it was necessary to construe the contract in a way to permit the Employer to "select individuals for positions of Foremen and Assistant Foremen who are not from the New York Times collective bargaining unit represented by [Respondent]."

On May 1, 2007, Employer's counsel wrote a letter to the Regional Director, informing her of the arbitrator's decision—"that The Times had the right to hire any individual as a press room foreman, regardless of the candidate's union or bargaining unit status"—and notifying her that the Employer had decided to withdraw the charge in this case.

Two days later, on May 3, 2007, the Regional Director issued an order dismissing the charge and withdrawing the complaint and notice of hearing, citing the Employer's May 1 request that the charge be withdrawn. It is this determination that the Respondent alleges warrants a grant of fees on its behalf.

2. Discussion and analysis

Under the Board's Rules and Regulations applicable to EAJA cases, an otherwise eligible respondent in an adversary adjudication "who prevails in that proceeding" may recover allowable fees and expenses connected with that proceeding. Section 102.143(b). In this case, the General Counsel submits that the Respondent is not eligible for fees because, when its assets are aggregated with those of its parent and affiliates, its net worth is greater than the threshold amount for eligibility.

The General Counsel also contends that, in any event, the Respondent is not entitled to fees because the Respondent did not prevail in the underlying proceeding and because the General Counsel was substantially justified in bringing the case. The Respondent disputes all of these allegations. If the General Counsel succeeds on any of its contentions, the application must be dismissed. For the reasons set forth below, I agree with the position of the General Counsel on the first two issues. I therefore grant the motion to dismiss the Respondent's application for fees.[1]

The Respondent gave short shrift to the requirement, under Section 102.143(c)(2) and (g) of the Board's Rules, that it prove that its net worth was under $7 million; that it employed less than 500 employees; and that its assets and employees should not be aggregated with its parent international union or other affiliates. Its application simply made conclusory statements to that effect. After my order to show cause, which specifically asked Respondent to address this issue, the Respondent supplied an affidavit from its president stating that the Respondent was completely independent from its parent; that it received "no funds from the GCU and the IBT"; and that those entities, with which the Respondent is affiliated, provide no funds or administrative support to Respondent and do not participate in Respondent's grievance handling or negotiations. Nor, according to the affidavit, does Respondent even consult with those entities in negotiations or grievance handling. The Respondent also attached its most recent LM-2 statement, which clearly states that its net worth is under $7 million and lists the salaries of several employees, which inferentially supports the contention that it has less than 500 employees. But no other evidence was submitted with respect to the relationship between Respondent and its parent and affiliates. Respondent's discussion of the aggregation issue is limited to a conclusory paragraph that references the affidavit. The General Counsel contends that Respondent's submission on aggregation of net worth is inadequate under Section 102.143(g) of the Board's rules and applicable Board law. As the General Counsel points out, affiliation is found and aggregation is appropriate where one entity "directly or indirectly controls" another entity, and the applicant bears the burden to show that control is lacking and aggregation is inappropriate. See *Teamsters Local 741 (A.B.F. Freight),* 321 NLRB 886, 889, 893 (1996); and *Pacific Coast District Council (Foss Shipyard)*, 295 NLRB 156, 157 (1989).

I do not believe that the evidence submitted by the Respondent meets its burden to show that it is not controlled by its parent and affiliates. Respondent did not discuss the structure of its parent and affiliates, their sources of income, or how they relate to Respondent. The affidavit simply states what the parent and affiliates do not do, but says nothing about what they do do that makes them a parent or affiliate. Nor did Respondent fully comply with the Board's rules in this matter. Section 102.147(f) of the Board's Rules requires the submission of sufficient information about the net worth not only of the applicant, but also of the parent or affiliates, from which the Board may make a determination of eligibility. Such information was not provided about the parent or affiliates. The Respondent has thus failed to provide sufficient information for me to determine whether it is controlled directly or indirectly by its parent or affiliates. This is not a hypothetical requirement. In the initial letter of June 10, 2005, requesting arbitration, Respondent noted that among the candidates who should be considered for the open positions were "100,000 potential candidates within all of the GCIU affiliates nationwide." Thus, in this very case, Respondent was insisting on a position that would open jobs for members of all unions affiliated with it throughout the country. In these circumstances, I find that the Respondent has not met its burden of proving that it is not directly or indirectly controlled by its parent or affiliates for the purposes of considering its assets and employees separately from those other entities.

Even assuming, however, that Respondent is deemed not to be controlled by its parent or affiliates, the Respondent would not be entitled to fees and expenses because it did not prevail in the underlying Board proceeding. The evidence submitted by the General Counsel, which is not contested by the Respondent, clearly shows that Respondent and its agents sought to force the Employer to hire only union members for foreman positions. Thus, in addition to the June letter seeking arbitration, Respondent's president made statements, including one to the membership, suggesting that Respondent was seeking to fill foreman positions with union members. That was the gravamen of the complaint. Such conduct was unlawful. See *New York Typographical Union No. 6 (New York Times)*, 237 NLRB 1241, 1244 (1978), and cases there cited.

Nothing in the record shows that either the arbitrator or the Regional Director ruled in a way that would make permissible either the request for arbitration or the Respondent's president's statements, insofar as to they sought to have the Employer discriminate in favor of union membership. Although, in a subsequent letter and in its answer to the complaint, Respondent sought to ameliorate its position in the arbitration and reframe the issue as one addressed to requiring the Employer to hire only unit members, its earlier attempts to have the Employer discriminate in favor of union members were not somehow expunged. Nor did it notify its members that it would not adhere to its earlier position. Indeed, in September of 2005, after Respondent's second letter to the arbitrator ameliorating its earlier position, Respondent's president notified its membership that it was insisting on forcing the Employer to fill the open foremen positions with union members. And even at the arbitration hearing, in November of 2006, Respondent's president made statements that indicated he was still seeking to have the Employer hire only union members. A clear disavowal of unlawful conduct and a notification of such disavowal to the Respondent's membership would have been part of a Board remedy for the unlawful conduct alleged in the complaint. But

[1] Even though the General Counsel contended, in the motion to dismiss, that the General Counsel was substantially justified in issuing the complaint, neither of the General Counsel's submissions specifically discussed this issue and indeed the General Counsel reserved the right "to amplify in [an] answer" reasons why the General Counsel was substantially justified in issuing the complaint. Accordingly, I do not reach that issue here, although my discussion of the prevailing party issue casts considerable doubt on the Respondent's claim that the General Counsel was not substantially justified in issuing the complaint.

nothing in the record shows that Respondent took these steps that might have expunged the effects of its unlawful actions. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

When the Regional Director withdrew the complaint at the request of the Employer, she did not—indeed, she could not—approve the Respondent's attempts to require the Employer to hire only union members. Instead, she acknowledged what the Employer properly viewed as an arbitration award that obviated any further Board proceedings. The arbitrator interpreted the contract contrary to the Respondent's position in the arbitration and in favor of the Employer's position: The Employer was not limited to hiring only unit members for the vacant foreman's position. That interpretation not only avoided an unlawful interpretation, but ruled out Respondent's earlier insistence on an unlawful interpretation: Since the Employer need not hire a unit member, perforce, the Employer need not hire a union member. Respondent did not win either the arbitration or the underlying NLRB case, which, of course, never resulted in a finding in favor of the Respondent on the merits. Thus, the withdrawal of the complaint in no way reflected a "material alteration of the legal relationship of the parties" to the benefit of Respondent. Indeed, if anything, the relationship was altered to the detriment of Respondent. Nor was there a "judicial imprimatur on the change." See *Buckhannon Bd. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 604–605 (2001).

Board law clearly supports the view that Respondent was not a prevailing party. The withdrawal of a complaint allegation by the Regional Director pursuant to a voluntary settlement does not make the charged party a "prevailing party." See *Carthage Heating Co*., 273 NLRB 120 (1984). The withdrawal of the complaint herein, pursuant to the parties' agreement to submit the matter to arbitration is similar in substance to the situation in *Carthage Heating*. Contrary to Respondent, *Shrewsbury Motors, Inc.,* 281 NLRB 486, 487–488 (1986), does not support its position. In that case, the Board distinguished *Cartage Heating* because, when the Regional Director withdrew the complaint, the charged party, the EAJA applicant, was "placed in exactly the same position as if the complaint allegations had been dismissed on their merits following a hearing." This is not the situation here, and the instant case is more akin to *Carthage Heating* than it is to *Shrewsbury Motors*.

It is difficult to discern from its submissions why Respondent thinks that it prevailed before the Board. In its response to the order to show cause, Respondent seems to contend that the matter should have been litigated rather than to have been withdrawn after a contract resolution that went against the Respondent. That position is not only counterintuitive, but does not address whether the Respondent prevailed. Nor did the complaint force Respondent to go to arbitration, as Respondent seems to contend. Indeed, the Regional Director acted only after the Respondent sought arbitration to enforce an illegal interpretation of the contract. The fact that the Respondent eventually ameliorated its position and the arbitrator avoided the illegal interpretation originally sought by Respondent does not mean that the Respondent somehow prevailed either before the arbitrator or the Board. For the Respondent to have prevailed in the underlying proceeding, the Board would have to have acknowledged that the complaint allegations that Respondent sought to have the Employer hire only union members were somehow without merit. That did not happen and I do not understand Respondent to say that the Board did acknowledge as much.

The Respondent concentrates on its position in the arbitration proceeding. But the complaint focuses on its position before the arbitration proceeding. Moreover, as indicated above, even apart from the letter seeking arbitration, Respondent's president allegedly made statements that sought discrimination by the Employer, based on union membership. Nothing in the arbitration or anything else in the record of this case could even arguably show that Respondent prevailed on that part of the complaint. Respondent's overall position—seeking to have the Employer discriminate on the basis of union membership—cannot be subdivided into discrete portions of the complaint for EAJA purposes, one for the request for arbitration and the other for statements by the Respondent's president. Nor has Respondent made that contention.

Indeed, even if one considers the request for arbitration in isolation, Respondent is not a prevailing party. Contrary to Respondent, the Supreme Court's *B E & K* decision, cited above, does not support its position. It is unclear whether *B E &* K applies to arbitrations, which are agreed upon methods of resolving disputes, but it clearly applies to completed lawsuits, which may, in certain circumstances, amount to unfair labor practices. 536 U.S. at 530–531. The Court disagreed with the Board's position that a reasonably based lawsuit could be an unfair labor practice simply because it was unsuccessful or retaliatory. 536 U.S. at 534–537. But the complaint allegation herein did not deal with a completed lawsuit or a completed arbitration as such; it dealt with an illegal interpretation of the contract. Moreover, nothing in the *BE & K* decision deals with the notion of a prevailing party. To the extent that the Respondent claims that its position on contract interpretation before the arbitrator was benign or reasonable and thus that his recognition of that position made it the prevailing party before the arbitrator, it misses the point. Although the arbitrator stated that Respondent's ameliorated position—that foremen had to be selected from the "unit" rather than the "union"—was plausible, he clearly eschewed the unlawful interpretation that spawned the complaint—that the foreman applicants had to be union members.

Accordingly, IT IS ORDERED that the motion to dismiss is granted.

Dated: Washington D.C. October 1, 2007